

No. 11074

2415

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BOWLES, Administrator, Office of
Price Administration,
Appellant,
vs.

M. R. LUSTER and A. M. LUSTER, Individually
and as Co-partners doing business as Sunbeam
Furniture Sales Co.,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

JUL 26 1945

PAUL P. O'BRIEN,
CLERK

No. 11074

United States
Circuit Court of Appeals
For the Fifth Circuit.

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellant,

vs.

M. R. LUSTER and A. M. LUSTER, Individually
and as Co-partners doing business as Sunbeam
Furniture Sales Co.,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
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Findings of Fact and Conclusions of Law.....	13
Amended	31
Judgment	20
Amended	37
Memorandum Decision	11
Motion for Rehearing and Motion to Amend Findings, Conclusions and Judgment.....	22
Names and Addresses of Attorneys of Record..	1
Notice of Appeal.....	39
Order Dismissing Motion for Rehearing.....	25
Order of Court Amending Findings of Fact, Conclusions of Law and Judgment.....	27
Statement of Points on Appeal:	
C. C. A.	44
D. C.	40
Stipulation and Order Permitting Reinstatement of Motion for Rehearing, etc.....	25

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In the District Court of the United States Southern
District of California, Central Division

No. 3574 O'C

CHESTER BOWLES, Administrator,
Office of Price Administration,

Plaintiff,

vs.

M. R. LUSTER and A. M. LUSTER,

individually and as co-partners, doing business
as SUNBEAM FURNITURE SALES CO.,

Defendants.

COMPLAINT FOR INJUNCTION

1. In the judgment of the Administrator defendants M. R. Luster and A. M. Luster, individually and as co-partners, doing business as Sunbeam Furniture Sales, have engaged in acts and practices which constitute violations of Section 4(a) of the Emergency Price Control Act of 1942 (Public L. No. 421, 77th Cong., 2d Sess., 56 Stat. 23), hereinafter called the "Act" in that the defendants have violated the General Maximum Price Regulation, as amended, (7 F.R. 3153) effective in accordance with the provisions of the Act, and therefore, pursuant to Section 205(a) of the Act, the Price Administrator brings this action to enforce Section 4(a) of said Act and said regulation.

2. Jurisdiction of this action is conferred upon the Court by [2] Section 205(c) of the Act.

3. Pursuant to the provisions of Section 2(a) of the Act, the Price Administrator issued and

there was published in the Federal Register the General Maximum Price Regulation effective May 11, 1942 (7 F.R. 3153) hereinafter referred to as the "Regulation", which Regulation as amended has been at all times since the date of its issuance in full force and effect.

4. At all times hereinafter mentioned defendants have been and now are engaged in business selling as wholesalers or jobbers tables, lamps, hampers, bookcases, chairs, bedroom sets, dinnerware sets, bridge sets, and divers other commodities and furniture, for which, upon sale by defendants, maximum prices are and were established by said Regulation. Said commodities are hereinafter referred to as "commodities".

5. Defendants have violated the Regulation in the following particulars:

A. Defendants have failed and neglected to keep and make available for examination by the Office of Price Administration, records as required by Section 1499.12 of the Regulation, showing as precisely as possible the basis upon which the defendants determined maximum prices in accordance with the pricing provisions of the Regulation for commodities sold by them.

B. Defendants have failed to compute their maximum prices as required by Section 1499.2 of the General Maximum Price Regulation, or to submit to the Office of Price Administration reports applying for specific authorization of maximum prices as required by Section 1499.3-

(a) of the Regulation for commodities sold by them.

Wherefore, the plaintiff prays for relief as follows:

I. For a permanent injunction directed to the defendants, defendants' agents, employees, servants and attorneys, and all other [3] persons in active concert or participation with any of them, jointly and severally:

A. Directing them forthwith,

1. To prepare, keep and make available for examination by the Office of Price Administration records hereinafter called "current pricing records" showing as precisely as possible the basis upon which defendants determined maximum prices in accordance with the pricing provisions of the Regulation for commodities sold by defendants after May 11, 1942, as required by Section 1499.12 of the Regulation; and

2. To keep and make available for examination by the Office of Price Administration records of the same kind as they have customarily kept, relating to the prices which they charged for commodities sold by them after May 11, 1942, as required by Section 1499.12 of said Regulation; and

3. To prepare and file with the district office of the Office of Price Administration, Los Angeles, California, an application for specific authorization of maximum prices, as required by Section 1499.3(a) of the Regulation, for commodities sold by defendants for which the maximum prices can-

not be determined under Section 1499.2 of the Regulation.

B. Restraining them from engaging in or causing any of the following acts or omissions to act:

1. Selling, delivering or offering to sell or deliver any of said commodities unless and until defendants first comply as to such commodity, with the directions contained in demands designated "1", "2", and "3" under "A" immediately above.

2. Selling, delivering or offering to sell or deliver said commodities at prices in excess of the maximum prices established therefor by the Regulation, or by any other regulation establishing maximum prices for said commodities; and

3. Doing or omitting to do any other act in violation of the Regulation or of any other regulation establishing maximum prices for said commodities; and [4]

4. Offering, soliciting, attempting or agreeing to do any of the foregoing.

II. For costs of suit herein, and for such other and further relief as the Court may deem just and proper.

Dated: April 15, 1944

H. EUGENE BREITENBACH
ROGER E. JOHNSON
DAVID M. HOFFMAN
HARRY F. MOLL

Attorneys for Plaintiff [5]

State of California

County of Los Angeles

United States of America—ss.

Harold L. Snyder, being by me first duly sworn, deposes and says:

That he is an employee of the United States Government, and during the time specified in the Complaint as hereinabove set forth, he was employed as an investigator for the Office of Price Administration, an agency of the United States Government; that in the course of his duty as an investigator for the Office of Price Administration he made an investigation of the matters set forth and mentioned in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

HAROLD L. SNYDER

Subscribed and sworn to before me this 15th day of April, 1944

[Seal] ESTHER BLAISDELL

Notary Public in and for the County of Los Angeles, States of California

My Commission expires May 14, 1946

[Endorsed]: Filed April 15, 1944. [6]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS

Come now the defendants and in answer to plaintiff's complaint on file herein admit, deny and allege as follows, to-wit:

1. Deny that they have knowingly and intentionally engaged in acts and/or practices which constitute violations of Section 4(a) of the Emergency Price Control Act of 1942 (Public L. No. 421, 77th Cong., 2d Sess., 56 Stat. 23), in that they have violated the General Maximum Price Regulation, as amended, or otherwise.

2. Deny that they have violated the Regulation in that they have failed and/or neglected to keep and/or make available for examination by the Office of Price Administration records as required by Section 1499.12 of the Regulation showing as precisely as possible the basis upon which the defendants determined maximum prices in accordance with the pricing provisions of the Regulation for commodities sold by them, and/or that they have failed to [7] compute their maximum prices as required by Section 1499.2 of the General Maximum Regulation, and/or that they failed to submit to the Office of Price Administration reports applying for specific authorization of maximum prices as required by Section 1499.3(c) of the Regulation for commodities sold by them for the reason that they were able to price under other sections and therefore it was not necessary for them to file applications for specific authorization, and they further

allege the facts to be as hereinafter set forth and not otherwise.

And as and for an Affirmative Defense to Plaintiff's Complaint on File Herein These Answering Defendants Allege:

1. That they commenced the business in which they are engaged during the month of October 1942, at a time after the effective date of the General Maximum Price Regulation; that they were, therefore, not in business in March 1942, and have no base period records nor are they required to have base period records for the reason hereinabove set forth.

2. That at all times the defendants have had in their possession and at their place of business for examination by the Office of Price Administration various records in connection with the operation of their business and in particular inventory control cards from which it was possible for these defendants to determine as precisely as possible the basis upon which they fixed the maximum prices for the sale of their commodities, which in their opinion and in their best judgment was in accordance with the pricing provisions of the Regulation covering the commodities sold by them.

3. That on or about the 28th day of March, 1944, one, Harold M. Snyder, representing himself as an investigator for the Office of Price Administration, called at the defendants place of business for the purposes, as he stated, of examining the records of these defendants, and when said investigator was advised by the defendants that among the

records maintained by them there were those of inventory control upon which records the goods that were being offered for sale was recorded as a basis for determining what jobbers all over the country were getting for similar merchandise, and when he was further informed that the said records would not be readily under- [8] standable to him, said investigator suggested that he would return in approximately three to four weeks, and desired these defendants during the interim to get together the various invoices of merchandise purchased in alphabetic form for his examination. That instead of returning, the complaint herein on file was filed, but notwithstanding the failure of the investigator to return these defendants have since said date diligently and in good faith proceeded to transpose and transcribe their records from the usual manner in which they were kept by the defendants so as to show as precisely as possible and in a more composite form the basis upon which the prices charged by these answering defendants were determined.

4. That the defendants are engaged as showroom stock jobbers of the commodities set forth in Paragraph 4 of plaintiff's complaint, carrying stocks of merchandise purchased in the eastern parts of the United States. That the business locally is actually operated by Melvin R. Luster, who is the son of A. M. Luster, and said A. M. Luster is not actively engaged in the conduct of the business at Los Angeles but acts primarily as a buyer for the defendant business in the eastern

market, the defendants not doing any buying in the local market whatsoever.

And for a Further, Separate and Affirmative Defense These Answering Defendants Allege:

1. That they have not knowingly, wilfully or intentionally violated any of the Regulations of the Office of Price Administration appertaining to the commodities carried by them in their business. That they have at all times had in their possession insofar as they were able to ascertain the records that were required by the Office of Price Administration and by the Regulations, and when they were advised that the records which they had were not proper they diligently set about to revise the records in such regards so as to make them more easily understandable, and allege and believe that their records are now in proper form.

Wherefore, these answering defendants pray that the plaintiff be denied the relief prayed for, that the plaintiff take nothing by his complaint on file herein, and that the Court make a finding after a hearing and the [9] presentation of evidence that these answering defendants have fully complied with all of the Regulations appertaining to their business and that they have prepared, maintained and kept for the inspection of the Office of Price Administration the records required to be kept by them in their business.

SAMUEL A. MILLER

Attorney for Defendants [10]

State of California

County of Los Angeles—ss.

A. M. Luster, being by me first duly sworn, deposes and says: That he is one of the defendants in the above entitled action; that he has read the foregoing Answer of Defendants and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

A. M. LUSTER

Subscribed and Sworn to before me this 8th day of May, 1944

[Seal] SAMUEL A. MILLER

Notary Public in and for the County of Los Angeles, State of California

[Endorsed]: Filed May 8, 1944 [11]

[Title of District Court and Cause.]

MEMORANDUM DECISION

This action is brought under the authority of the Emergency Price Control Act of 1942 (Public L. No. 421, 77th Cong., 2d Sess., 56 Stat. 23), as amended, (Sec. 101 of Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess.), hereinafter called the "Act" and the General Maximum Price Regulation, as amended, (7 F. R. 3153), which was issued under the provisions of the Act on April 30, 1942, effective May 11, 1942.

The applicable provisions of the Act are Section 205(a), which provides for injunctive relief for any violation of Section 4 of the Act, and Section 4(a) which sets forth the acts and omissions to act that are prohibited by the Statute and furnish ground for injunctive relief under Section 205(a). [12]

The court finds that the plaintiff, under date of November 22, 1943, called the attention of defendants to the complaints against them and requested that they come to the Office of Price Administration in order to determine the method by which their merchandise was priced. The court finds that Mr. A. M. Luster telephoned from Chicago that he would appear within a period of two weeks to discuss the matter. Mr. M. R. Luster, a partner and one of the defendants, had charge of the business in Los Angeles. Sometime in the latter part of March, 1944, after the plaintiff had conducted an investigation, the defendant, A. M. Luster, called the plaintiff and was advised that the matter had been referred to the proper authorities for proper enforcement.

It would seem that the defendants were given an unusual opportunity, from the time they were advised of the complaints until this action was filed, but failed to make any attempt to comply with the request of the plaintiff. The court finds that the defendants did not keep proper records as disclosed by the testimony when the matter was investigated, and that the defendants have not properly priced their merchandise as required by the statute and the regulations.

The defendants contend that they have, since the investigation and the filing of the action, complied with the statute. It is not necessary for the court to pass upon this contention. A recent case decided by the Supreme Court of the United States is *Walling, Administrator vs. Helmerich & Payne, Inc.*, (Nov. 6, 1944).....U. S., wherein the court said:

“Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power. See *Hecht Co. v. Bowles*, 321 U. S. 321, 327; *Otis & Co. v. Securities and Exchange Commission*, 106 F. 2d 579, 583-584.” [13]

Judgment will be entered for the plaintiff against the defendants, and the prayer set forth in the complaint will be granted.

The plaintiff will prepare Findings of Fact, Conclusions of Law and Judgment within ten days after the date of this memorandum decision.

Dated November 15, 1944.

J. F. T. O'CONNOR,

U. S. District Judge [14]

[Title of District Court and Cause]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause came on regularly for trial on October 19, 1944, and the Court having heard the evidence and the matter having been submitted for

decision by the Court, the Court finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. That defendants, M. R. Luster and A. M. Luster, individually and as co-partners, doing business as Sunbeam Furniture Sales Co., have violated Section 4(a) of the Emergency Price Control Act of 1942 (Pub. L. 421, 77th Cong., 2d Sess., 56 Stat. 23) as amended, (Sec. 101 of Stabilization Extension Act of 1944, Public Law 383, 78th Cong. 2d Sess.), hereinafter called the "Act", in that defendants have engaged in acts and practices which constitute [15] violations of the General Maximum Price Regulation, as amended, issued and promulgated by the Administrator of the Office of Price Administration in accordance with the provisions of said Act, and which became effective for wholesale sales on May 11, 1942.

2. Jurisdiction of this action is conferred upon the Court by Section 205(c) of the Act.

3. During the period commencing on or about October 1, 1942, up to and including the date of the trial of this action on October 19, 1944, defendants M. R. Luster and A. M. Luster, have been engaged in the business of selling at wholesale household furniture and miscellaneous commodities, including tables, lamps, hampers, bookcases, chairs, bedroom sets, dinnerware sets, bridge sets and divers other commodities and furniture at their place of business, located at 1337 South Flower Street, Los Angeles, California.

4. That under the provisions of Section 1499.12 of said General Maximum Price Regulation, which became effective May 11, 1942, and thereafter remained in effect and still is in effect, defendants were required to keep and make available for examination by the Office of Price Administration records showing as precisely as possible the basis upon which they determined maximum prices for those commodities sold after the effective date of said General Maximum Price Regulation and for which, upon sale by them, maximum prices are established by said General Maximum Price Regulation.

5. That under the provisions of Section 1499.2 of said General Maximum Price Regulation, defendants were required to price the commodities hereinabove referred to in accordance with the provisions of Section 1499.2 of the General Maximum Price Regulation, and were required to determine and report to the District Office of the Office of Price Administration, in accordance with Section 1499.3(a) of the Regulation, the maximum prices of any commodities which could not be priced by defendants under said Section 1499.2 of the Regulation, and in the case of commodities which could not be priced by defendants under said Section 1499.3(a), to file applications with the District Office of the Office of Price Administration and obtain approval of maximum prices in accordance with Section 1499.3(c) of the Regulation. [16]

6. That subsequent to the effective date of said General Maximum Price Regulation, defendants

sold as wholesalers or jobbers, furniture and other commodities, the maximum prices of which were established by the General Maximum Price Regulation.

7. That since Oct. 1st, 1942 defendants have knowingly failed and neglected to keep and make available for examination by the Office of Price Administration, current records showing as precisely as possible the basis upon which they determined their maximum prices for said household furniture and miscellaneous commodities which they sold as wholesalers subsequent to May 11, 1942.

8. The Court finds that the defendants were not in business in Los Angeles, California during March, 1942. The Court further finds that there were competitors of the same class as defendants in the city of Los Angeles, State of California, selling the same or similar commodities as the defendants, since March 1942. That since Oct. 1, 1942, defendants have failed and neglected to price said commodities in accordance with the provisions of Section 2(b) of the General Maximum Price Regulation, to-wit: defendants failed to determine their maximum prices from the highest prices charged during March, 1942 by the most closely competitive seller of the same class: that the Price Administrator issued and there was published in the Federal Register the General Maximum Price Regulation effective May 11, 1942 (7 F.R. 3153), referred to as the "Regulation", which Regulation as amended has been at all times since the date of its issuance in full force and effect.

9. That under date of November 22, 1943, the plaintiff by letter called the attention of the defendants to complaints against them, and requested that they come to the Office of Price Administration in order to determine the method by which they were pricing their merchandise. That Mr. A. M. Luster telephoned from Chicago, Illinois, that he would appear within a period of two weeks to discuss the matter. That Mr. M. R. Luster and one of the defendants had charge of the business in Los Angeles. That sometime after March, 1944, after plaintiff had conducted an investigation, the defendant A. M. Luster called plaintiff and was advised that the matter had been re- [17] ferred to Enforcement for proper enforcement action. The Court further finds that the defendants were given an unusual opportunity from the time they were first advised of the complaints to make a voluntary effort to comply with the plaintiff's request.

From the foregoing facts the Court makes the following

CONCLUSIONS OF LAW

1. That plaintiff is entitled to a permanent injunction directed to the defendants, their agents, employees, servants and attorneys, and all other persons in active concert or participation with any of them, jointly and severally:

A. Directing them forthwith,

1. To prepare, keep and make available for examination by the Office of Price Administration

records hereinafter called "Current pricing records", showing as precisely as possible the basis upon which defendants determined maximum prices in accordance with the pricing provisions of the Regulation for commodities sold by defendants after May 11, 1942, as required by Section 1499.12 of the Regulation; and

2. To keep and make available for examination by the Office of Price Administration records of the same kind as they have customarily kept, relating to the prices which they charged for commodities sold by them after May 11, 1942, as required by Section 1499.12 of said Regulation; and

3. To prepare and file with the District Office of the Office of Price Administration, Los Angeles, California, an application for specific authorization of maximum prices, as required by Section 1499.3-(c) of the Regulation, for commodities sold by defendants for which the maximum prices cannot be determined under Section 1499.2 of the Regulation.

B. Restraining them from engaging in or causing any of the following acts or omissions to act:

1. Selling, delivering or offering to sell or deliver any of said [18] commodities unless and until defendants first comply as to such commodity with the directions contained in demands designated "1", "2" and "3" under "A" immediately above.

2. Selling, delivering or offering to sell or deliver said commodities at prices in excess of the maximum prices established therefor by the Regulation, or by any other regulation establishing maximum prices for said commodities; and

3. Doing or omitting to do any other act in violation of the Regulation or of any other regulation establishing maximum prices for said commodities; and

4. Offering, soliciting, attempting or agreeing to do any of the foregoing.

The Court further finds in reference to the contention of the defendants that they have since the investigation and the filing of this action, complied with the statute; that it is not necessary to pass upon this contention, as the Supreme Court in the case of the United States, Walling vs. Helmerich & Payne, Inc., decided November 6, 1944, held that "Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power". See Bowles vs. Hecht (34 U.S. 321, 327).

Let judgment be prepared and entered accordingly.

Dated at Los Angeles, California, this 14th day of December, 1944.

J. F. T. O'CONNOR

United States District Judge.

[Endorsed]: Filed Dec. 14, 1944. [19]

In the District Court of the United States Southern
District of California, Central Division

No 3574-O'C

CHESTER BOWLES, Administrator,
Office of Price Administration,

Plaintiff,

vs.

M. R. LUSTER and A. M. LUSTER, individually
and as co-partners, doing business as SUN-
BEAM FURNITURE SALES CO.,

Defendants

JUDGMENT

The above entitled action for an injunction having been duly tried, and oral and documentary evidence having been introduced by the plaintiff and defendants, and the matter having been considered by the Court, and the Court having made its Findings of Fact and Conclusions of Law ;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the defendants, M. R. Luster and A. M. Luster, individually and as co-partners, doing business as Sunbeam Furniture Sales Co., their agents, servants, employees, attorneys and all persons in active concert or participation with the defendants, be and they hereby are:

1. Order and directed to prepare, keep and make available for examination by the Office of Price Administration, records called "current [20] pricing records", showing as precisely as possible

the basis upon which defendants determined maximum prices in accordance with the pricing provisions of the General Maximum Price Regulation for all commodities sold by defendants after May 11, 1942, as required by Section 1499.12 of the Regulation.

2. Ordered and directed to determine and report to the district office of the Office of Price Administration, in accordance with Section 1499.3(a) of the Regulation, the maximum prices of any commodities which cannot be priced under Section 1499.2 of the Regulation, and in the case of commodities which cannot be priced by defendants under said Section 1499.3(a), to file applications with the district office of the Office of Price Administration and obtain approval of maximum prices in accordance with Section 1499.3(c) of the Regulation.

3. Permanently enjoined from selling, delivering, transferring or offering to sell, deliver or transfer commodities at prices in excess of the prices permitted by the General Maximum Price Regulation, as heretofore or hereafter amended or any other regulation promulgated by the Office of Price Administration governing the maximum prices of said commodities.

4. Permanently enjoined from doing or omitting to do any other act in violation of the General Maximum Price Regulation, as heretofore or hereafter amended, issued pursuant to the Emergency Price Control Act of 1942.

It Is Further Ordered, Adjudged and Decreed that the jurisdiction of this cause is retained for

the purpose of enabling any of the parties to this decree to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction of or the carrying out of this decree, for the modification thereof and the enforcement of compliance therewith, and for the punishment of any violations thereunder.

Dated at Los Angeles, California, this 14th day of December, 1944.

J. F. T. O'CONNOR

United States District Judge

Judgment entered December 14, 1944. Docketed Dec. 14, 1944. Book C O, Page 510.

EDMUND L. SMITH,

Clerk,

FRANCIS E. CROSS,

Deputy.

[Endorsed]: Filed Oct. 14, 1944. [21]

[Title of District Court and Cause.]

MOTION OF DEFENDANTS FOR REHEARING AND MOTION TO AMEND FINDINGS, CONCLUSIONS AND JUDGMENT.

Come Now the defendants above named and respectfully represent to this Honorable Court that on the 14th day of December, 1944, a judgment was entered herein in favor of the plaintiff, which judgment was filed and entered and docketed in Civil Order Book 29 at page 510, which judgment was

an injunction against the defendants, and that in the opinion of the defendants the evidence was insufficient to justify the judgment herein, upon which ground defendants ask for a rehearing or a new trial.

That in the event the motion for rehearing or new trial be denied that the Findings and Conclusions of Law submitted herein by the plaintiff be amended in the following respects, and the judgment amended accordingly if the Findings and Conclusions are amended:

That Finding No. 7 be stricken in its entirety:

That portion of Finding No. 8 reading as hereinafter set forth [22] be stricken and omitted from the Findings:

“That since May 11, 1942, defendants have failed and neglected to price said commodities in accordance with the provisions of Section 2(b) of the General Maximum Price Regulation to-wit: defendants failed to determined their maximum prices from the highest prices charged during March, 1942 by the most closely competitive seller of the same class”.

That there be stricken from Findings No. 9 the following:

“That Mr. A. M. Luster telephoned from Chicago, Illinois, that he would appear within a period of two weeks to discuss the matter. That Mr. M. R. Luster and one of the defendants had charge of the business in Los Angeles. That sometime after March 1944, after plaintiff had conducted an investigation,

the defendant A. M. Luster called plaintiff and was advised that the matter had been referred to Enforcement for proper enforcement action."

That there be stricken from the Conclusions of Law based upon the plaintiff's Findings, Conclusion No. 3 as there was no evidence to indicate that it was necessary for the defendants to file an application under Section 1499.3(c) of the Regulation.

That there also be stricken from the Conclusions of Law the following proposed Conclusions offered by the plaintiff as appears on Page 5 thereof, read as follows:

"or by any other regulation establishing maximum prices for said commodities; and

Doing or omitting to do any other act in violation of the Regulation or of any other regulation establishing maximum prices for said commodities; and

Offering, soliciting, attempting or agreeing to do any [23] of the foregoing."

That the basis and authority for striking the last-above enumerated and quoted Conclusions submitted by the plaintiff are the cases of *Bowles vs. Sacher Fur Co.* and *Bowles vs. Schein and Janowsky* decided in the United States Circuit Court of Appeals under date of on or about December 11, 1944 in a decision written by the Honorable Judge Swan on an appeal taken by the Price Administrator from a decision of District Judge Rifkind who refused to include in an omnibus judgment

for injunction presented by the Office of Price Administration in broad language restraining the defendants from "doing or omitting to do any other act in violation of said Regulation as heretofore or hereafter amended", the District Judge limiting the injunction to the specific violations conceded or proven.

The above motions will be based upon this motion and upon all the pleadings and papers on file and upon the minutes of the Court, upon the Reporter's Transcript of his shorthand notes which are on file herein, and under the authority of Rules of Civil Procedure 52(b) and 59(a),(b).

Dated this 22nd day of December, 1944.

SAMUEL A. MILLER

Attorney for defendants.

[Endorsed]: Filed Dec. 26, 1944. [24]

At a stated term, to-wit: The January Term, A. D. 1945, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of San Diego on Tuesday the 2nd day of January in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable J. F. T. O'CONNOR,
District Judge.

[Title of Cause.]

ORDER

This cause coming on for hearing of motion of defendants for a re-hearing or a new trial, pursuant to motion filed December 26, 1944; J. K. Coady, Esq., appearing as counsel for the plaintiff; and C. W. McClain, Court Reporter, being present and reporting the proceedings:

It is ordered that the said motion of defendants be, and it hereby is, dismissed, there being no appearances in behalf of the defendants as this time, and exception allowed to defendants. [25]

[Title of District Court and Cause.]

STIPULATION PERMITTING REINSTATEMENT OF MOTION OF DEFENDANTS FOR REHEARING AND MOTION TO AMEND FINDINGS, CONCLUSIONS AND JUDGMENT, AND ORDER ON SAID STIPULATION.

It Is Hereby Stipulated and Agreed by and between the parties hereto by their respective counsel, that the motion of defendants for rehearing and motion to amend Findings, Conclusions and Judgment which was dismissed on January 2nd, 1945, by the Honorable J. F. T. O'Connor, Judge of the District Court, may be reinstated and placed upon the Court's law and motion calendar for disposition on Monday, the 29th day of January, 1945, or at such other date as the Court may direct.

Dated: January 15th, 1945.

H. EUGENE BREITENBACH,
WM. U. HANDY, DAVID M.
HOFFMAN and HARRY F.
MOLL

By WM. U. HANDY
Attorneys for Plaintiff
SAMUEL A. MILLER
Attorney for Defendants

It is so ordered: Dated this 18th day of January, 1945.

J. F. T. O'CONNOR
District Judge

[Endorsed]: Filed Jan. 18, 1945. [26]

[Title of District Court and Cause.]

ORDER OF COURT AMENDING FINDINGS
OF FACT, CONCLUSIONS OF LAW AND
JUDGMENT, FILED DECEMBER 14TH,
1944.

Counsel for the defendants having filed his motion for a rehearing and to amend Findings, Conclusions and Judgment, under date of December 26th, 1944; and, pursuant to stipulation filed on January 18th, 1945, the said motion having come before the Court for hearing on January 29th, 1945, and at that time the Court having heard the arguments of counsel, and having considered the motion, Now Orders As Follows:

The said motion of counsel for a rehearing is hereby denied.

With respect to the said motion to amend Findings of Fact, Conclusions of Law and the Judgment, it is hereby ordered that:

(1) The motion to strike Finding 7 in its entirety is denied, except that the date in Finding 7 will be changed from "May 11, 1942," to "October 1, 1942." (page 3, lines 5 and 10).

(2) The motion to strike certain parts of Finding 8 will be denied except that on line 15 thereof the date "May 11" will be stricken; and, in lieu thereof, the date "October 1" will be inserted (page 3).

(3) The motion to strike out certain parts of Finding 9 is denied (pages 3 and 4). [27]

(4) The motion to strike from the Conclusions of Law, Conclusion No. 3, is denied.

(5) The motion to strike the following language "or by any other regulation establishing maximum prices for said commodities", paragraph 2, page 5, from the Conclusions of Law, is granted (Lines 6 and 7).

(6) With respect to the motion to strike paragraph 3 of the Conclusions of Law, page 5, "doing or omitting to do any other act in violation of the regulation or of any other regulation establishing maximum prices for said commodities", there will be stricken from such paragraph the following language commencing on line 9 of paragraph 3, page 5, "or of any other regulation establishing maximum prices for said commodities".

(7) The motion to strike paragraph 4 of the Conclusions of Law, page 5, line 11, "offering, soliciting, attempting or agreeing to do any of the foregoing" is granted.

The court on its own motion strikes out "May 11," on line 4, of page 2 of the Judgment, and inserts in lieu thereof "October 1," and there is also stricken from paragraph 3 of the Judgment, page 2, line 16, the following language, "or hereafter amended or any other regulation promulgated by the Office of Price Administration governing the maximum prices of said commodities".

There is stricken from paragraph 4 of the Judgment, page 2, commencing on line 20, the following language "as heretofore or hereafter amended, issued pursuant to the Emergency Price Control Act of 1942"; and, in lieu thereof, the following language is ordered to be inserted: "in effect at the time of filing this action".

It is further ordered that there be stricken from the Judgment the following language commencing on line 23 and ending on line 28, page 2 of the Judgment: "It is further ordered, adjudged and decreed that the jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction of or the carrying out of this decree, for the modification thereof and the [28] enforcement of compliance therewith, and for the punishment of any violations thereunder".

It is the opinion of the Court that to require the defendants to be bound by, or to require the defendants to be subject to, penalties for the violation of "any other act in violation of the regulations" or for "offering, soliciting, attempting or agreeing to do any of the foregoing," or to compel defendants to be bound by any future regulation, would deprive the defendants of their day in court, and would be a denial of the right of the defendants if the Court found that in good faith they should be permitted to attack a regulation before The Emergency Court of Appeals; in all other respects the Findings of Fact, Conclusions of Law and the Judgment are affirmed.

It is the opinion of the Court that jurisdiction should not be retained in these actions for the purposes stated in the Judgment. If future violations are found to occur by the plaintiff another action can be instituted. It is not the policy of this Court to keep defendants in a state of suspended animation, or hold above their heads the sword of Damocles which may fall at any moment, not knowing when they will be brought into court on contempt proceedings for a violation, real or alleged.

(See *Hecht Company v. Bowles*, 321 U.S. 321 64 S. Ct. 587; *Bowles v. Town Hall Grill*, 145 Fed (2d) 689; *Bowles v. Huff* (9 CCA) Decided 12/27/44. . . . Fed, (2d)

Counsel for the plaintiff will prepare amended Findings of Fact and Conclusions of Law and Judgment within ten days after notice of this Order and in accordance therewith, for the signa-

ture of the Court, after presenting some to counsel for the defendants for approval as to form.

Dated: Los Angeles, Calif., February 2nd, 1945.

J. F. T. O'CONNOR

U.S. District Judge

[Endorsed]: Filed Feb. 2, 1945. [29]

[Title of District Court and Cause.]

AMENDED FINDINGS OF FACT AND
CONCLUSION OF LAW

This cause came on regularly for trial on October 19, 1944, and the Court having heard the evidence and the matter having been submitted for decision by the Court, and the Court having made its findings of fact and conclusions of law and a motion having been made to amend said findings of fact and conclusions of law and said motion having been granted, the Court now makes its amended findings of fact and conclusions of law and finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. That defendants, M. R. Luster and A. M. Luster, individually and as co-partners, doing business as Sunbeam Furniture Sales Co., have violated Section 4(a) of the Emergency Price Control Act of 1942 (Pub. L. 421) 77th Cong. 2d Sess., 56 Stat. 23) as amended, (Sec. 101 of Stabilization Extension Act of 1944, Public Law 383, 78th Cong.

2d Sess.), hereinafter called the "Act", in that defendants have engaged in acts and practices which constitute violations of the General Maximum Price Regulation, as amended, issued and promulgated by the Administrator of the Office of Price Administration in accordance with the provisions of said Act, and which became effective for wholesale sales on May 11, 1942.

2. Jurisdiction of this action is conferred upon the Court by Section 205(c) of the Act.

3. During the period commencing on or about October 1, 1942, up to and including the date of the trial of this action on October 19, 1944, defendants M. R. Luster and A. M. Luster, have been engaged in the business of selling at wholesale household furniture and miscellaneous commodities, including tables, lamps, hampers, bookcases, chairs, bedroom sets, dinnerware sets, bridge sets and divers other commodities and furniture at their place of business, located at 1337 South Flower Street, Los Angeles, California.

4. That under the provisions of Section 1499.12 of said General Maximum Price Regulation, which became effective May 11, 1942, and thereafter remained in effect and still is in effect, defendants were required to keep and make available for examination by the Office of Price Administration records showing as precisely as possible the basis upon which they determined maximum prices for those commodities sold after the effective date of said General Maximum Price Regulation and for which, upon sale by them, maximum prices are

established by said General Maximum Price Regulation.

5. That under the provisions of Section 1499.2 of said General Maximum Price Regulation, defendants were required to price the commodities hereinabove referred to in accordance with the provisions of Section 1499.2 of the General Maximum Price Regulation, and were required to determine and report to the District Office of the Office of Price Administration, in accordance with Section 1499.3(a) of the Regulation, the maximum prices of any commodities which could not be priced by defendants under said Section 1499.2 of the Regulation, and in the case of commodities which could not be priced by defendants under said Section 1499.3(a), to file applications with [31] the District Office of the Office of Price Administration and obtain approval of maximum prices in accordance with Section 1499.3(c) of the Regulation.

6. That subsequent to the effective date of said General Maximum Price Regulation, defendants sold as wholesalers or jobbers, furniture and other commodities, the maximum prices of which were established by the General Maximum Price Regulation.

7. That since October 1, 1942, defendants have knowingly failed and neglected to keep and make available for examination by the Office of Price Administration, current records showing as precisely as possibly the basis upon which they determined their maximum prices for said household furniture and miscellaneous commodities which

they sold as wholesalers subsequent to October 1, 1942.

8. The Court finds that the defendants were not in business in Los Angeles, California during March, 1942. The Court further finds that there were competitors of the same class as defendants in the City of Los Angeles, States of California, selling the same or similar commodities as the defendants, since March 1942. That since October 1, 1942, defendants have failed and neglected to price said commodities in accordance with the provisions of Section 2(b) of the General Maximum Price Regulation, to wit: defendants failed to determine their maximum prices from the highest prices charged during March, 1942 by the most closely competitive seller of the same class; that the Price Administrator issued and there was published in the Federal Register the General Maximum Price Regulation effective May 11, 1942 (7 F.R. 3153), referred to as the "Regulation", which Regulation as amended has been at all times since the date of its issuance in full force and effect.

9. That under date of November 22, 1943, the plaintiff by letter called the attention of the defendants to complaints against them, and requested that they come to the Offices of Price Administration in order to determine the method by which they were pricing their merchandise. That Mr. A. M. Luster telephoned from Chicago, Illinois, that he would appear within a period of two weeks to discuss the matter. That Mr. M. R. Luster and one of the defendants had charge of the business in

Los Angeles. That sometime [32] after March 1944, after plaintiff had conducted an investigation, the defendant A. M. Luster called plaintiff and was advised that the matter had been referred to Enforcement for proper enforcement action. The Court further finds that the defendants were given an unusual opportunity from the time they were first advised of the complaints to make a voluntary effort to comply with the plaintiff's request.

From the foregoing facts the Court makes the following:

CONCLUSIONS OF LAW

1. That plaintiff is entitled to a permanent injunction directed to the defendants, their agents, employees, servants and attorneys, and all other persons in active concert or participation with any of them, jointly and severally:

A. Directing them forthwith,

1. To prepare, keep and make available for examination by the Office of Price Administration records hereinafter called "current pricing records", showing as precisely as possible the basis upon which defendants determined maximum prices in accordance with the pricing provisions of the Regulation for commodities sold by defendants after May 11, 1942, as required by Section 1499.12 of the Regulation; and

2. To keep and make available for examination by the Office of Price Administration records of the same kind as they have customarily kept, relating to the prices which they charged for commodities sold by them after May 11, 1942, as re-

quired by Section 1499.12 of said Regulation; and

3. To prepare and file with the District Office of the Office of Price Administration, Los Angeles, California, an application for specific authorization of maximum prices, as required by Section 1499.3(e) of the Regulation, for commodities sold by defendants for which the maximum prices cannot be determined under Section 1499.2 of the Regulation.

B. Restraining them from engaging in or causing any of the following [33] acts or omissions to act:

1. Selling, delivering or offering to sell or deliver any of said commodities unless and until defendants first comply as to such commodity with the directions contained in demands designated "1", "2" and "3" under "A" immediately above.

2. Selling, delivering or offering to sell or deliver said commodities at prices in excess of the maximum prices established therefor by the Regulation; and

3. Doing or omitting to do any other act in violation of the Regulation; and

The Court further finds in reference to the contention of the defendants that they have since the investigation and the filing of this action, complied with the statute; that it is not necessary to pass upon this contention, as the Supreme Court in the case of the United States, Walling vs. Helmerich & Payne, Inc., decided November 6, 1944, held that "Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the

ambit of judicial power". See *Bowles vs. Hecht* (34 U.S. 321, 327).

Let judgment be prepared and entered accordingly.

Dated at Los Angeles, California, this 12th day of February, 1945.

J. F. T. O'CONNOR

United States District Judge

[Endorsed]: Filed Feb. 12, 1945. [34]

[Title of District Court and Cause.]

AMENDED JUDGMENT

The above entitled action for an injunction having been duly tried, and oral and documentary evidence having been introduced by the plaintiff and defendants, and the matter having been considered by the Court, and the Court having made its Findings of Fact and Conclusions of Law and a motion having been made to amend the judgment and the said motion having been granted and the Court having made amended Findings of Fact and Conclusions of Law ;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the defendants, M. R. Luster and A. M. Luster, individually and as co-partners, doing business as Sunbeam Furniture Sales Co., their agents, servants, employees, attorneys and all persons in active concert or participation with the defendants, be and they hereby are:

1. Ordered and directed to prepare, keep and

make available for [35] examination by the Office of Price Administration, records called "current pricing records", showing as precisely as possible the basis upon which defendants determined maximum prices in accordance with the pricing provisions of the General Maximum Price Regulation for all commodities sold by defendants after October 1, 1942, as required by Section 1499.12 of the Regulation.

2. Ordered and directed to determine and report to the district office of the Office of Price Administration, in accordance with Section 1499.3(a) of the Regulation, the maximum prices of any commodities which cannot be priced under Section 1499.2 of the Regulation, and in the case of commodities which cannot be priced by defendants under said Section 1499.3(a), to file applications with the district office of the Office of Price Administration and obtain approval of maximum prices in accordance with Section 1499.3(c) of the Regulation.

3. Permanently enjoined from selling, delivering, transferring or offering to sell, deliver or transfer commodities at prices in excess of the prices permitted by the General Maximum Price Regulation, as heretofore.

4. Permanently enjoined from doing or omitting to do any other act in violation of the General Maximum Price Regulation in effect at the time of filing this action.

Dated at Los Angeles, California, this 12th day of February, 1945.

J. F. T. O'CONNOR

United States District Judge

Approved as to form as required by Rule 7 this 10th day of Feb. 1945.

SAMUEL A. MILLER

Atty. for Defts.

Judgment entered Feb. 12, 1945. Docketed Feb. 12, 1945. Book C.O. 30, Page 672. Edmund L. Smith, Clerk, Francis E. Cross, Deputy.

[Endorsed]: Filed Feb. 12, 1945. [36]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Chester Bowles, Administrator of the Office of Price Administration, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 12th day of February, 1945, in Central Division Civil Order Book 30 at pages 672 to 673 inclusive, in the Office of the Clerk of the above entitled Court.

Dated: May 10th, 1945.

H. EUGENE BREITENBACH

WM. U. HANDY

JOSEPH K. COADY

HARRY F. MOLL

[Endorsed]: Filed and mailed copy to Samuel A. Miller, attorney for defendants, May 10, 1945.

[37]

[Title of District Court and Cause.]

ASSOCIATION OF ATTORNEYS

We hereby associate Joseph K. Coady, Enforcement Attorney, Office of Price Administration, as one of the attorneys for the plaintiff in the above entitled action in lieu and stead of David M. Hoffman, who is no longer connected with or an employee of the Office of Price Administration.

H. EUGENE BREITENBACH

WM. U. HANDY

DAVID M. HOFFMAN

HARRY F. MOLL

By WM. U. HANDY

Attorneys for Plaintiff

I hereby accept association as attorney for the Plaintiff in the above entitled action.

JOSEPH K. COADY

Enforcement Attorney [38]

I hereby consent to such association.

DAVID M. HOFFMAN

[Endorsed]: Filed May 10, 1945. [39]

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

The Court erred

(1) By granting the defendants' motion to modify the judgment;

(2) By restricting the injunction to regulations then in force and striking therefrom all reference to future amendments, which might later be promulgated, to the applicable regulations governing the same commodities;

(3) By eliminating from the injunction the prohibition against "offering, soliciting, attempting or agreeing to do any of the foregoing". [40]

Dated, Los Angeles, California, the day of, 1945.

H. EUGENE BREITENBACH
WM. U. HANDY
JOSEPH K. COADY
HARRY F. MOLL

By: HARRY F. MOLL

Attorneys for plaintiff-
appellant

[Endorsed]: Filed May 22, 1945. [41]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Plaintiff and Appellant designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Complaint.
2. Answer of the defendants M. R. Luster and A. M. Luster.
3. Memorandum decision and order for judgment in favor of plaintiff, filed November 15, 1944.
4. Findings of fact and conclusions of law and judgment for permanent injunction.

5. Defendants' motion for rehearing, new trial, or to amend findings, conclusions, judgment, with points and authorities.

6. Order dismissing defendants' motion for rehearing, entered [42] January 2nd, 1945.

7. Stipulation and order permitting reinstatement of and placing case on calendar for January 29th, 1945 for hearing.

8. Defendants' motion for rehearing and to amend findings of fact, conclusions of law and judgment.

9. Order of Court amending findings of fact, conclusions of law and judgment, filed February 2nd, 1945.

10. Amended findings of fact, conclusions of law and judgment.

11. Notice of appeal, filed May 10th, 1945.

12. Substitution of attorneys filed May 10th, 1945.

13. This designation.

14. Statement of points on which appellant intends to rely.

H. EUGENE BREITENBACH

WM. U. HANDY

JOSEPH K. COADY

HARRY F. MOLL

By: HARRY F. MOLL

Attorneys for plaintiff-
appellant

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed May 22, 1945. [43]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 45 inclusive contain full, true and correct copies of Complaint for Injunction; Answer of Defendants; Memorandum Decision; Findings of Fact and Conclusions of Law; Judgment; Motion of Defendants for Rehearing and Motion to Amend Findings, Conclusions and Judgment; Minute Order Entered January 2, 1945; Stipulation and Order Permitting Reinstatement of Motion for Rehearing etc.; Order of Court Amending Findings of Fact, Conclusions of Law and Judgment; Amended Findings of Fact and Conclusions of Law; Amended Judgment; Notice of Appeal; Association of Attorneys; Statement of Points; Designation of Record and Affidavit of Service by Mail which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 13th day of June, 1945.

[Seal]

EDMUND L. SMITH, CLERK

By: THEODORE HOCKE

Chief Deputy Clerk

[Endorsed]: No. 11074. United States Circuit Court of Appeals for the Ninth Circuit. Chester Bowles, Administrator, Office of Price Administration, Appellant, vs. M. R. Luster and A. M. Luster, Individually and as Co-partners doing business as Sunbeam Furniture Sales Co., Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed June 14, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11074

CHESTER BOWLES, Administrator, Office of
Price Administration,

Appellant,

vs.

M. R. LUSTER and A. M. LUSTER, individually
and as co-partners, doing business as SUN-
BEAM FURNITURE SALES CO.,

Appellees.

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

The Court erred

- (1) By granting the appellees' motion to modify the judgment;
- (2) By restricting the injunction to regulations then in force and striking therefrom all reference to future amendments, which might later be promulgated, to the applicable regulations governing the same commodities;
- (3) By eliminating from the injunction the prohibition against "offering, soliciting, attempting or agreeing to do any of the foregoing".

Dated: June 11, 1945

H. EUGENE BREITENBACH
WM. U. HANDY
JOSEPH K. COADY
HARRY F. MOLL

By: HARRY F. MOLL

Attorneys for Appellant

[Endorsed]: Filed June 14, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellant designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Complaint.
2. Answer of the appellees M. R. Luster and A. M. Luster.

3. Memorandum decision and order for judgment in favor of appellant, filed November 15, 1944.
4. Findings of Fact and conclusions of law and judgment for permanent injunction.
5. Appellees' motion for rehearing, new trial, or to amend findings, conclusions, judgment, with points and authorities.
6. Order dismissing appellees' motion for rehearing, entered January 2nd, 1945.
7. Stipulation and order permitting reinstatement of and placing case on calendar for January 29th, 1945 for hearing.
8. Appellees' motion for rehearing and to amend findings of fact, conclusions of law and judgment.
9. Order of Court amending findings of fact, conclusions of law and judgment, filed February 2nd, 1945.
10. Amended findings of fact, conclusions of law and judgment.
11. Notice of appeal, filed May 10th, 1945.
12. Substitution of attorneys filed May 10th, 1945.

13. This designation.

14. Statement of points on which appellant intends to rely.

H. EUGENE BREITENBACH

WM. U. HANDY

JOSEPH K. COADY

HARRY F. MOLL

By: HARRY F. MOLL

Attorneys for Appellant.

[Endorsed]: Filed June 14, 1945. Paul P. O'Brien, Clerk.

